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MICHAEL RODA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1503

SEARS, ROEBUCK AND CO., ON ITS OWN BEHALF AND ON BEHALF OF OTHER CHARGING PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, ACTING GENERAL COUNSEL, IN HIS OWN BEHALF AND AS AGENT FOR THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner,

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NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, ACTING GENERAL COUNSEL, IN HIS OWN BEHALF AND AS AGENT FOR THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Sears, Roebuck and Co. (hereafter "Sears") prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 24, 1972, petition for rehearing denied by the Court *en banc* on February 6, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, p. A1) is reported at 473 F. 2d 91. The opinion of the District Court (App. D, *infra*, p. A8) is not officially reported but is unofficially reported at 79 LRRM 2942.

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1972. App. B, *infra*. A timely petition for rehearing was denied by the Court *en banc* on February 6, 1973 (App. C, *infra*) and this petition is filed within ninety days of that date. A motion to recall and stay mandate, predicated on the submission of this petition, is presently pending before the Court of Appeals.[1] This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Assuming that a district court may enjoin agency proceedings pending resolution of a request for documents under the Freedom of Information Act (5 U. S. C. § 552),[2] does an agency's violation of its statutory duty to promptly produce public documents, establish, as a matter of law, a *prima facie* showing of irreparable injury sufficient for the issuance of a preliminary injunction where the agency fails to demonstrate that the injunction will result in substantial harm to public or private interests.

2. Whether the equity powers of a federal district court, ancillary to a *de novo* proceeding under the Freedom of Infor-

1. This motion was necessitated by the parties' mutually erroneous view, which prevailed until April 13, 1973, that the petition for rehearing in the Court of Appeals had not yet been decided. It was for this reason that, subsequent to the actual denial of that petition, Sears submitted to this Court in *The Renegotiation Board* v. *Bannercraft Clothing Company*, No. 72-822, *cert. granted*, January 23, 1973, a motion *amicus curiae* to postpone consideration of that case pending determination of the petition for rehearing so that the instant case could be considered in conjunction therewith. This motion was denied by the Court on March 26, 1973. App. F, *infra*.

2. This issue, *i.e.*, "[w]hether the Freedom of Information Act authorizes the district courts to enjoin agency proceedings until the court determines whether litigants before the agency are entitled to documents sought under the Act," is currently before the Court in *Bannercraft*. Pet. for Cert. in No. 72-822, p. 2.

mation Act, are replaced by the judicial review procedures of a court of appeals, predicated on the substantial evidence test, under Section 10(f) of the National Labor Relations Act (29 U. S. C. § 160(f)).

STATUTES INVOLVED

The relevant provisions of the Freedom of Information Act, 5 U. S. C. § 552 (hereafter the "Information Act"), and the Rules and Regulations and Statements of Procedure of the National Labor Relations Board (hereafter the "Board"), 29 C. F. R. § 101.2 *et. seq.*, are set forth in Appendix G.

STATEMENT OF THE CASE

This case originally arose when District Court issued a preliminary injunction barring further Board proceedings until Sears, the charging party before the Board, had a reasonable time to analyze information already belatedly made available by the Board, and other information that the Board was expected to make available, pursuant to a proper request by Sears under the Information Act. App. D, *infra*, p. A8. The injunction was predicated, *first*, on the jurisdiction of the District Court to grant such relief in view of the absence of any "other remedy available to plaintiff" to rectify the extended delay on the part of the General Counsel in producing the requested documents, and, *second*, on the District Court's conclusion that, unless the equitable relief sought was granted, "plaintiff will suffer irreparable harm" by being deprived of the meaningful use of the requested documents. *Id.* at A9. Two judges of the Court of Appeals, however, granted summary reversal notwithstanding the intervening decision by the District Court that Sears was correct "on all points" on the merits of its Information Act claim. App. A, *infra*, p. A4, n. 4. While acknowledging that the District Court had properly asserted jurisdiction under *Bannercraft*, the two judge panel

concluded that the District Court erred in determining that Sears would be irreparably harmed by participating, absent the requested information, in the Board case. App. A, *infra*, p. A4. A petition for rehearing was denied by the Court of Appeals *en banc* on February 6, 1973. App. C, *infra*.

Sears, pursuant to Sec. 101.2 of the Board's Rules (App. G, *infra*, p. A19), had initiated the underlying Board case by filing unfair labor practice charges with the Board's Seattle, Washington Regional Director as agent for the Board's General Counsel. Since the charges raised novel legal issues, the Regional Director, in accord with agency practice,[3] referred them to the General Counsel's Advice Branch for resolution. Subsequently, based on "mandatory instructions" (App. A, *infra*, p. A2) from that Branch, the Regional Director dismissed the charges. Sears thereupon appealed this determination, pursuant to Sec. 102.19 of the Board's Rules (App. G, *infra*, p. A18), to the General Counsel's Appeals Branch. Concurrently therewith, in order to ascertain the basis for the Advice Branch decision and thereby prepare the "complete [appeal] setting forth the facts and reasons upon which it is based" as required by Sec. 102.19 of the Board's Rules, as well as effectively participate in settlement discussions and/or a hearing if complaint did issue,[4] Sears sought access

3. See Sec. 101.8 of the Board's Rules and Sec. 202.1 of the Board's Statements of Procedure, App. G, *infra*, pp. A19-20; see also Quarterly Report on Case Development by present Board General Counsel Nash, May 31, 1972, reprinted at 80 LRR 105 (1972), and the General Counsel's presentation to the House Labor Subcommittee on the National Labor Relations Board on June 29, 1961, excerpted at I CCH Labor Law Reports ¶ 1150.01 (p. 3075) ("the General Counsel's final determination is communicated to the Regional Office by way of a memorandum from the Advice Branch . . . this memorandum ordinarily recites the facts upon which the Advice Branch relied in making its determination, the exact issue involved, instructions for the final processing of the case, and a detailed legal rationale, including any pertinent Board or Court decisions").

4. See Secs. 101.9 and 101.10 of the Board's Rules, App. G, *infra*, pp. A19-20.

under the Information Act to the Advice decision in its case, related Advice and Appeals determinations and their respective indices. When three months of diligent effort to obtain such documents—during which time Sears' appeal was granted and complaint issued—proved unsuccessful, the instant action was initiated on August 4, 1971, under the Information Act, seeking both the disputed data and a stay of the underlying agency proceeding.

After, as the District Court found (App. D, *infra*, p. A8), considerable delay by the General Counsel,[5] on February 6, 1972, the General Counsel agreed to provide Sears with a portion, but not all, of the requested information. Notwithstanding that the information made available was (1) largely unindexed, requiring, for example, a search of over 8,000 documents in order to ascertain those particular decisions relevant to Sears' charge;

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5. On October 26, 1971, six months after Sears had made its first request, the General Counsel sought an extension of time to file an answer. After noting that it was General Counsel Nash's predecessor, Respondent Goslee, who had denied the requested materials to Sears, the General Counsel stated:

> . . . Peter G. Nash is now General Counsel of the National Labor Relations Board and has ordered a review of the refusal to disclose such information and *is presently disposed to believe that he will make the information available.*
> . . . The General Counsel expects that a complete and final review of the question of whether and how to make such information available will be made by the beginning of January. [Emphasis added].

Despite Sears' strenuous opposition to this request—in which it argued that a delay should only be permitted if accompanied by a guarantee that the underlying Board case would be set back substantially after Sears received access to the materials, particularly in view of the statutory mandate that "proceedings [brought under the Information Act] before the district court . . . take precedence on the docket over all other causes, and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way" (5 U. S. C. § 552(a))—the court nevertheless granted the requested extension.

(2) that pertinent material, incorporated by reference, upon which the decisions relied was not made available at all; and (3) that none of the "parties to the dispute [had any] objection" (App. D, *infra.* p. A8), the General Counsel refused to extend the then-scheduled April 6, 1972 hearing date in the underlying Board case. Sears was thus denied both a reasonable opportunity to examine that information which was provided and any possibility of satisfactorily resolving, prior to a hearing in the Board case, the remaining documentary conflicts. Hence it sought and obtained the injunctive relief at issue here.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Raises an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court

The question here presented is one that is likely to repeatedly recur in the administration of the Information Act. It is an issue which is integrally intertwined with the *Bannercraft* jurisdictional issue; it is also equally important in determining whether the "Act's requirement that production be prompt" (*National Cable Television Assn. F. C. C.*, ... F. 2d ....., n. 11 (D. C. Cir., April 17, 1973)) is a reality or a mirage. As one Congressional committee recently concluded, one of the major impediments to "the efficient operation" of the Act has been "foot-dragging" and "delay" on the part of administrative agencies and a failure to recognize that, since requested information is "likely to be a perishable commodity", any lengthy delay in providing such data "may result in substantial damages to the plaintiff's case" and render the information sought "totally useless."[6] *Bannercraft*, if resolved in accord with the Court of Appeals, would provide a potential

6. *Administration of the Freedom of Information Act*, H. R. Rep. No. 92-1419, 92d Cong. Sess. (1972), pp. 10, 74 and 82-3.

means of alleviating this problem. Equitable recourse, if limited to the peculiar irreparable injury threatened in *Bannercraft*, will be of dubious value. The instant case thus presents a crucial component of the issue raised in *Bannercraft*: what showing of irreparable injury is required to permit enjoining administrative proceedings.

The irreparable injury standard adopted by the court below would virtually restrict judicial intervention to Renegotiation Board proceedings. Equitable relief would be unavailable even where, as in this case, (1) the requested information is required to be produced under the Act, (2) such information would be "a significant help" to the requesting party in the underlying agency proceeding (App. A, *infra*, p. A4), (3) the agency has engaged in extensive procrastination (see n. 5, *supra*), and (4) there is no countervailing harm to other interests in continuing the administrative proceeding. This result, it is submitted, negates the Information Act's applicability to Board cases. It thus disregards the Act's objective of creating "a judicially enforceable public right to secure" disclosure (*E. P. A.* v. *Patsy Mink*, ... U. S. . . . ., 41 U. S. L. W. 4201, 4208 (1973)), as well as the omission of any Congressional "restriction on the Court's jurisdiction in equity" (*Porter* v. *Warner Holding Company*, 328 U. S. 395, 398 (1946)). For example, absent the District Court's action, the very reason the information here was requested would have been obfuscated and any inquiry on the merits of the request rendered a meaningless exercise. The General Counsel would have denied through delay what it could not deny directly: the effective use of the material sought. In the circumstances of this case, therefore, the use of the court's historic equitable jurisdiction was a " 'common sense solution' . . . to 'do complete justice. . . .' " *Morrow* v. *District of Columbia*, 417 F. 2d 728 (D. C. Cir. 1969). Review of the instant case is required so that this Court may resolve when and under what circumstances this "common sense solution" may be applied.

B. The Decision Below Misinterprets Decisions of This Court and Conflicts with the Decisions of Other Courts of Appeals

The Court of Appeals construed *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938), as indicating that, since "it is only in extraordinary circumstances that a court may . . . intervene to interrupt agency proceedings", the "burden of submitting to agency hearings", without relevant information properly sought under the Act, does not constitute "the type of injury to justify judicial intervention." App. A., *infra*, p. A4. This view of *Myers* is incorrect and contrary to the proper interpretation of that case rendered by other appellate decisions.

Myers held that the ordinary burden of administrative proceedings is not, in and of itself, sufficient to constitute irreparable injury. "It does not follow, however," as *Bannercraft* observed, "that the harm stemming from pending administrative proceedings can never be so great as to be 'irreparable.' " 466 F. 2d at 358. In fact, *Myers* was not intended to govern a claim of "illegal" procedure or truncated "opportunity to introduce evidence" (303 U. S. at 45), let alone a violation of an independent statutory right. *"Myers"*, as the District Court properly concluded, "is distinguishable since it involved judicial review of the . . . Board's decisional processes rather than, as here, rights under the . . . Information Act". App. D, *infra*, p. A9. Indeed, where, as in this case and *Bannercraft*, "the administrative process cannot function as it was intended to function until [there is] . . . access to the documents"—where a charging party like Sears is precluded from "effectively" performing his administrative role—then there is "the sort of clear threat to a statutory right which can easily be categorized as an impending irreparable injury." *Bannercraft*, 466 F. 2d at 356.

1. The court below, although acknowledging that the disputed documents might be of "significant help" to Sears in "its litigating stance" before the Board, declined to find that

Sears had been effectively harmed in its capacity as a charging party since "[w]hatever benefits may be derived from the documents can be developed in the proceeding by the Board ['s General Counsel]". App. A, *infra*, p. A4. This argument contravenes *International Union, UAW, Local 283* v. *Scofield*, 382 U. S. 205 (1965). The Court there recognized that the General Counsel was not contemplated as the exclusive guardian of private interests. 382 U. S. at 217, n. 7. The National Labor Relations Act interblends, as the decision below failed to appreciate, private and public interests. Accordingly, where a private party's representation of his own interest is essentially impaired, there is a fundamental procedural infirmity warranting equitable relief. Cf. e.g., *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557 (1919); and *Amos Treat & Co.* v. *S. E. C.*, 306 F. 2d 260 (D. C. Cir. 1962).

2. The court below also erred in assuming that, even if Sears were harmed in the Board proceeding, "an appropriate remedy can be fashioned by the Board, or by the court of appeals with jurisdiction of the petition for review or enforcement in the event the Board issues an order." App. A, *infra*, p. A4. *First*, as *Bannercraft* observed, "[t]he Information Act confers jurisdiction on the *District Court* to order production of appropriate documents, and there is no reason to assume that this jurisdiction was not intended to be exclusive. . . . Certainly it cannot be said that Congress intended the Board to enforce the Information Act against itself . . . The plain fact is that there *are* no administrative remedies under the Freedom of Information Act." 466 F. 2d at 358 (Emphasis the Court's). *Second*, in this case, as in *Jewel Companies, et al.* v. *F. T. C.*, 432 F. 2d 1155 (7th Cir. 1955), even if there is ultimate appellate review in a proceeding under Section 10(e) or (f) of the Labor Act, the standard of review would be totally different. The limited scope of review under Section 10(e) or (f)[7] is surely not com-

7. See, *e.g.*, *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951). Cf. *Volkswagen of America* v. *Jahre*, 472 F. 2d 557 (5th Cir. 1973).

parable to that prevailing in a *de novo* proceeding in a district court under the Information Act. In contrast to *Myers*, therefore, and like *Jewel*, unless the District Court had the power to grant equitable relief here, there would be "no effective way of presenting the claim of invalidity at a later date." 432 F. 2d at 1158.

CONCLUSION

The instant case presents an important aspect of *Bannercraft* which warrants resolution by this Court in conjunction with that case. It also provides the Court with a desirable vehicle to explicate the appropriate boundaries between *Myers* and *Skinner & Eddy*. For each of these reasons, Sears prays that the petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 72-1425

SEARS, ROEBUCK AND CO., ON ITS OWN BEHALF AND ON BEHALF OF OTHER CHARGING PARTIES UNDER THE NATIONAL LABOR RELATIONS ACT

v.

THE NATIONAL LABOR RELATIONS BOARD AND EUGENE G. GOSLEE, ACTING GENERAL AGENT FOR THE NATIONAL LABOR RELATIONS BOARD, APPELLANTS

APPELLANTS' MOTION FOR SUMMARY REVERSAL

Decided October 24, 1972

Messrs. Glen M. Bendixsen and *Charles N. Steele* were on the motion for summary reversal for appellants.

Messrs. Lawrence M. Cohen, Jeffrey S. Goldman, Alan Raywid, and *Gerald C. Smetana,* were on the opposition to appellants' motion for summary reversal.

Before: LEVENTHAL and WILKEY, *Circuit Judges.*

Per Curiam: This case involves the propriety of judicially ordered interruption of agency proceedings pending resolution of a Freedom of Information Act claim.

Plaintiff, Sears, Roebuck & Co., charged the Retail Clerk's International Union (the Union) with violating section 8(b)(3) of the National Labor Relations Act, as amended, 29 U. S. C. § 158(b)(3) (1970). This resulted in the issuance of a complaint by the Board's General Counsel against the Union.

Prior to the issuance of the complaint, Sears requested of the Board and General Counsel certain documents known as Advice and Appeals memoranda. These documents, prepared by the General Counsel's Office in Washington, are issued in novel and significant cases to "guide" the NLRB's Regional Directors in their decisions as to when to issue complaints. The District Court found, and we accept that finding for purposes of this motion, that the memoranda are, in substance, mandatory instructions designed to govern when complaints will issue.

Even though the General Counsel issued a complaint against the Union, Sears continued to demand the Advice and Appeals memoranda. Sears puts its interest in them on its right, as a charging party, to participate in the Board's proceeding. See 29 C. F. R. § 101.10 (1972). Following refusals by the Board and General Counsel to release the memoranda, Sears filed an action in the District Court under the Freedom of Information Act, 5 U. S. C. § 552 (1970), alleging that it could not meaningfully participate in the unfair labor practice charge without the requested information. On February 3, 1972, the General Counsel announced that he would make available all Advice and Appeals memoranda in completed cases.[1] He continued to refuse to release the memoranda prepared for Sears' case against the Union (Board Case No. 19-CB-1673).

In March 1972, after an oral hearing, the District Court found that Sears would be irreparably injured by participating in the NLRB hearing without the Advice and Appeals memoranda. The Court also found that Sears had a probable right

1. This category of memoranda would include instances where complaints did not issue, and in cases where complaints did issue, cases in which Board action was complete.

to the requested documents and that the District Court had jurisdiction to enjoin the Board's proceedings. The court therefore enjoined the defendants from going forward with the unfair labor practice proceedings "until plaintiff has had a reasonable time to inspect and analyze that information which the Board has made available; to resolve any disputes with respect to the remainder of the information requested by the plaintiff, and should such, information then also be made available, to inspect and analyze such additional information." On March 29, 1972, the Board filed a notice of appeal from the injunction. It subsequently filed a motion in this court for summary reversal of the injunction. Since the filing of that motion the District Court has refused to stay its order.

The District Court was correct in its premise that there is jurisdiction to enjoin agency proceedings pending resolution of a Freedom of Information Act claim. Bannercraft Clothing Co., Inc. v. The Renegotiation Board, D. C. Cir., No. 24,685 (decided July 6, 1972). However, as *Bannercraft* itself noted, "the bare existence of jurisdiction does not mean that appellees were entitled to the relief they were granted by the District Court." Slip opin. at 15. While Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 (1938), cannot be taken as mandating that such intervention is never warranted,[2] it still has vitality as indicating that it is only in extraordinary circumstances that a court may, in the sound exercise of discretion, intervene to interrupt agency proceedings to dispose of a single, intermediate or collateral issue. A cogent showing of irreparable harm is an indispensable condition of such intervention.

Irreparable harm cannot be established by a mere reliance on the burden of submitting to agency hearings. This is a risk of litigation that is inherent in society, and not the type of injury to justify intervention. *E.g., Myers, supra,* at 51-52.[3]

2. See, *e.g.*, cases cited in *Bannercraft, supra,* at 16, n. 7.

3. Where the expense of submitting to administrative proceedings is extraordinary, judicial intervention may be justifiable. See Public Utilities Commission of Ohio v. United Fuel Gas Co., 317 U. S. 456, 469 (1943).

In the case at bar we do not have a cogent showing, indeed we do not see a substantial showing, of how Sears will be irreparably harmed in its participation in the unfair labor practice charge without the Advice and Appeals memoranda whose disclosure is still under judicial consideration. Sears was successful in seeking the issuance by the Board of a complaint of unfair labor practice charge. Sears does not contend, nor is there any reason to believe, that the Board will not prosecute the complaint diligently and in good faith. The disputed memoranda are available to the Board. Whatever benefits may be derived from the documents can be developed in the proceedings by the Board.

It may be that Sears will be held entitled to the documents under the Information Act,[4] and it may be that its possession of those documents will be a convenience, indeed a significant help, in its litigating stance. But those considerations are of a different order from the kind of irreparable injury required to interrupt an administrative proceeding. Should Sears' claim to the memoranda be upheld on appeal and should it appear that there was significant adverse impact on Sears in the unfair labor practice charge proceedings because it was denied timely disclosure, an appropriate remedy can be fashioned by the Board, or by the court of appeals with jurisdiction of the petition for review or enforcement in the event the Board issues an order.

In our decision, we have taken note that the memoranda here requested are documents prepared to guide the Regional Directors in deciding when to issue complaints. Although the memoranda may be of some value in prosecuting a complaint, they were not designed to serve that function. This strengthens our conclusion that the case lacks the requisite showing that access to the documents is necessary to avoid irreparable harm to Sears.

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4. On August 10, 1972 the District Court issued its final order in the underlying Freedom of Information Act case. It held for Sears on all points. An appeal from that decision is pending in this court.

The motion for summary reversal is granted and the case is remanded to the District Court for disposition consistent with this opinion.

So ordered.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

September Term 1972

SEARS, ROEBUCK AND CO., on its own behalf and on behalf of other charging parties under the National Labor Relations Act,
vs.
THE NATIONAL LABOR RELATIONS BOARD.

No. 72-1425

Appeal from the United States District Court for the District of Columbia Before Levanthal and Wilkey, Circuit Judges.

JUDGMENT

On consideration of Appellants' Motion for Summary Reversal and of the responsive pleadings filed with respect thereto, it is

ORDERED AND ADJUDGED by this Court that the Motion for Summary Reversal is granted and the case is remanded to the District Court for disposition consistent with the opinion filed herein this date.

Per Curiam
For the Court:
/s/ HUGH E. KLINE

Date: October 20, 1972.
Per Curiam.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit
SEPTEMBER TERM, 1972

No. 72-1425

SEARS, ROEBUCK AND CO., on its own behalf and on behalf of other charging parties under the National Labor Relations Act,

vs.

THE NATIONAL LABOR RELATIONS BOARD and EUGENE G. GOSLEE, Acting General agent for the National Labor Relations Board.

Appellants

} Civil Action 1571-71

Before: BAZELON, *Chief Judge;* WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges.*

ORDER

On consideration of appellee Sears, Roebuck and Company petition for rehearing, suggestion for rehearing *en banc*, or, motion to stay judgment pending disposition of case 72-1870 and of the responsive pleadings, it is

ORDERED by the Court *en banc* that the aforesaid petition, suggestion and motion are denied.

Per Curiam

APPENDIX D

UNITED STATES DISTRICT COURT
For the District of Columbia

SEARS, ROEBUCK AND CO., *Plaintiff,* *vs.* NATIONAL LABOR RELATIONS BOARD, et al., *Defendants.*	Civil Action No. 1571-71

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The plaintiffs, Sears, Roebuck and Co., is the charging party in an unfair labor practice proceeding before the National Labor Relations Board (Case No. 19-CB-1673), and, in aid of the prosecution of that charge, has sought since May, 1971, effective access, pursuant to the Freedom of Information Act, 5 U. S. C. § 552, to information relevant to said case that is in the possession of the Board.

2. That, on February 16, 1972, the Board finally made available the vast majority of the information which plaintiff desired.

3. That, notwithstanding the Board's considerable delay in providing plaintiff with access to at least a portion of the information it requested, plaintiff's subsequent difficulty in locating and identifying desired documents and the disputes which remain as to the availability of other information, the Board intends to proceed to hearing in Case No. 19-CB-1673 on April 6, 1972, notwithstanding that all parties to the dispute have no objection to an extension of the hearing date.

4. Sears now seeks a mandatory injunction to prevent the Board from proceeding in Case No. 19-CB-1673 until it has received all of the information to which it is entitled under 5 U. S. C. § 552 and has had a reasonable opportunity to analyze the same.

5. The Board relies, in opposing such an injunction, on *Sears, Roebuck and Co.* v. *N. L. R. B.*, 433 F. 2d 210 (6th Cir. 1970), which, in turn, relies on *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938). *Myers*, however, is distinguishable since it involved judicial review of the National Labor Relations Board's decisional processes rather than, as here, rights under the Freedom of Information Act.

6. In this Court's view, the controlling decisions are *Deering-Milliken* v. *Johnson*, 296 F. 2d 856 (4th Cir. 1961), involving an analogous provision of the Administrative Procedure Act, 5 U. S. C. § 1009(b), in which the district court was found to have power to enjoin the Board, and *Bristol-Myers Co.* v. *F. T. C.*, 424 F. 2d 935 (D. C. Cir. 1970), in which this Court of Appeals in dictum indicated that, upon a showing of irreparable injury (such as that caused by agency delay in making available information required to be provided under the Freedom of Information Act), a court may enjoin agency proceedings.

7. The plaintiff has demonstrated a probable right under the Freedom of Information Act to the information it desires; that unless the motion for preliminary injunction is granted, plaintiff will suffer irreparable harm; and that there will be no harm to the other parties in Case No. 19-CB-1673 by reason of the grant of a preliminary injunction.

8. That this Court has jurisdiction to provide the equitable relief sought herein and that there is no other adequate remedy available to plaintiff.

/s/ H. J. Corcoran
Judge

Dated: March 27, 1972

APPENDIX E

UNITED STATES DISTRICT COURT

For the District of Columbia

SEARS, ROEBUCK AND CO., on its own behalf and on behalf of other charging parties under the National Labor Relations Act, *Plaintiff,* *vs.* NATIONAL LABOR RELATIONS BOARD and EUGENE G. GOSLEE, Acting General Counsel, in his own behalf and as agent for the National Labor Relations Board, *Defendants.*	Civil Action No. 1571-71

MEMORANDUM AND ORDER

This cause is before the Court on cross motions for summary judgment.

Plaintiff[1] Sears, Roebuck and Co. (hereinafter Sears) is a "charging party" before the National Labor Relations Board, (Board Case No. 19-CB-1673), and seeks access, pursuant to the Freedom of Information Act (hereinafter the Act), 5 U. S. C. § 552, to certain documents issued by the Office of the General

1. Plaintiff argues that it is a proper class representative and may therefore seek relief on behalf of a class of charging parties before the National Labor Relations Board. Since whatever relief this Court chooses to grant the plaintiff will necessarily be binding on the defendants as to all persons, the Court need not and does not address this issue.

Counsel of the Board, commonly referred to as Advice and Appeals memoranda, and certain other materials incorporated by reference therein.

The Act grants this Court jurisdiction "to enjoin the defendants from withholding agency records" prospectively in addition to "order[ing] the production of any Agency records improperly withheld" from a complainant. 5 U. S. C. § 552(a)(3).

Defendants have historically maintained a uniform policy of withholding the sought-after documents, and, although a portion of the memoranda have been made available by defendants to the public during the pendency of this case,[2] the defendants maintain that this revelation reflects a voluntary change of policy and is not required by the Act. Defendants also refuse to make available documents incorporated by reference in said memoranda, and have deleted from the documents made available such matter as the names of parties, the names of attorneys and citations to prior Advice and Appeals memoranda.

The controversy giving birth to this action[3] arose between the plaintiff and the Retail Clerk's International Union (hereinafter "Union") in April, 1971. The plaintiff charged the Union with violating Section 8(b)(3) of the National Labor Relations Act (hereinafter, N. L. R. A.). As required by N. L. R. A. plaintiff Sears filed its charge with the Regional Director of the Nineteenth Region of the National Labor Relations Board in Butte, Montana (hereinafter, Regional Director). The objective of the plaintiff in bringing its charge to the Regional Director was to obtain the issuance of a complaint against the Union.

2. On February 3, 1972 the General Counsel announced that, while he still considered the Advice and Appeals memoranda protected by the Freedom of Information Act, he would make available all Advice and Appeals memoranda when the case involved was completed.

3. In related proceedings this Court issued a preliminary injunction on March 17, 1972 staying proceedings in Board Case No. 19-CB-1673 until records which the Board made available to the plaintiff (only after substantial delay) could be examined by the plaintiff for use in that case before the Board.

Under the provisions of the N. L. R. A. the final authority to issue such a complaint is vested in the office of the Board's General Counsel 29 U. S. C. § 153(d)[4]. The General Counsel has in turn delegated the initial power to determine whether a complaint should be issued to the Regional Directors. National Labor Relations Board, Organization and Functions, Section 203.1, 32 F. R. 9588. Board Statements of Procedure, Sec. 101.4, 29 C. F. R. Sec. 101.4.

To promote uniformity in the administration of the Act, the General Counsel required that Regional Directors when faced with requests that raise "novel" problems, submit a description of the request to the General Counsel's Office in Washington for "Advice" as to disposition. Statements of Procedure Sec. 101.8. The ostensible purpose behind this procedure is to insure that new questions arising in the field of labor relations be handled in substantially the same manner in all parts of the country. In this way Advice memoranda are issued in all the novel and significant cases brought by charging parties. After extensive centralized consideration the Advice branch of the Office of the General Counsel issues these memoranda containing its final conclusions to the regional directors, who regularly implement these memoranda by issuing or refusing to issue complaints as "advised" by the Advice Branch.

Defendants claim that these memoranda include a diversity of information including settlement suggestions. However, careful examination of the procedure reveals that the net effect of an Advice memorandum is to truncate the delegated authority of a Regional Director to the point where his issuance of a complaint or refusal to do so is merely a ministerial function. Far from being recommendations, although ancillary recommendations may be contained therein, Advice memoranda are instructions mandatory in substance if not in form. As such,

4. The General Counsel concedes that in the performance of his pre-complaint prosecutorial authority, he is clearly an agency within the meaning of 5 U. S. C. § 551(1).

they constitute "instructions to Staff that affect a member of the public." 5 U. S. C. § 552(a)(2)(c).

When a regional director fails to issue a complaint, either pursuant to the recommendation of the Advice Branch, or independently in a case not referred to the Advice Branch, the charging party may move the Office of the General Counsel to reconsider the decision by seeking relief from the Office of Appeals. Statements of Procedure, Sec. 101.6. The conclusions of the Office of Appeals have traditionally been summarized in memoranda called the "General Counsel's Minute." Plaintiff does not seek access to these documents.

Thereafter the General Counsel either sustains the refusal to proceed or orders the Regional Director to issue the complaint. Additionally the Office of Appeals prepares a second memorandum—the "agenda minute"—which provides an analysis of the decision and which is sent to the Regional Director. It is access to this second group of appeals memoranda that plaintiff seeks.

Letters containing only the result, though not necessarily the underlying rationale, were sent to the parties previously in this action. During the pendency of this action a new policy has been instituted by the General Counsel whereby a portion of the information found previously only in the agenda minutes is included in these letters.

The Action of the General Counsel's office on appeals of the refusal of Regional Directors to issue complaints, whether made pursuant to "advice" from the Counsel office or otherwise is clearly final. This is not a preliminary view or a record of advocacy and debate, it is a final determination of the General Counsel's staff of the disposition of a charge. It is not an expression of a point of view, it is the disposition of a charge. As such the Appeals memorandum lies outside the Act's § (b)(5) exemption. Congress intended by that exemption only to promote the "free flow of information" *Ackerly* v. *Ley*, 420 F. 2d 1336, 1341 (D. C. Cir. 1969), and did not "design

[it] to facilitate the easy exchange of substantive declarations of policy. Indeed if it were, the exemption would have clearly engulfed the rule." *Sterling Drug* v. *F. T. C.*, 450 F. 2d 698, 713 (D. C. Cir. 1971) Bazelon J. dissenting in part. *See also*, Davis, "The Information Act: A Preliminary Analysis," 34 Chicago Law Rev. 761. Since the memoranda lie outside the exemption, they *must* be disclosed. *Tennessean Newspapers* v. *F. H. A.* .... F. 2d .... (6th Cir., May 4, 1972); *Getman* v. *N. L. R. B.*, 450 F. 2d 670, 672 (D. C. Cir. 1971).

It follows, further, that documents incorporated by reference in Advice and Appeals memoranda, even though possibly qualified for a Sec. (b) exemption taken separately, must also be disclosed, since they have lost their exempt status by incorporation. *American Mail Line Ltd.* v. *Gulick*, 411 F. 2d 696, 703 (D. C. Cir. 1968).

Upon consideration of the undisputed facts and after examining examples of the requested memoranda, this Court concludes: (a) that the Advice and Appeals memoranda are not "intra-agency memorandums" within the meaning of § 552(b)(5) of the Act; (b) that the Advice memoranda are "instructions" which affect a member of the public within the meaning of the Act; (c) that the Appeals memoranda issued in cases still pending, including those issued in Board Case No. 19-CB-1673, are "final opinions" within the meaning of the Act (d) that documents expressly incorporated by reference are in fact part of said memoranda; (e) that in cases where the aforesaid memoranda rely upon and make reference to the "circumstances of the case" without delineating these "circumstances" the General Counsel must produce explanatory material including documents unless the General Counsel demonstrates such documents to be exempt; (f) that the Advice and Appeals memoranda made available shall include the names of the parties, the names of the attorneys, citations to prior cases and all other information for which justification for deletion has not been explained fully in writing except the names of affiants, and settlement

suggestions from the Office of the General Counsel to the regional directors; and (g) that, the Act requires that the Advice and Appeals memoranda issued since July 4, 1967 be indexed and such indices be made available to the public.

Accordingly, the court concludes that the plaintiff's motion for summary judgment should be granted and the defendant's motion for summary judgment be denied. It is So Ordered and further Ordered that

(1) that defendants promptly make available to the public all Appeals and Advice memoranda issued since July 4, 1967, and any document expressly incorporated therein by reference;

(2) that defendants with reasonable promptness produce and compile, if necessary, indices of said memoranda;

(3) that defendants produce explanatory material including existing documents in those instances where Advice or Appeals memoranda rely upon the "circumstances of the case" or some other vague and imprecise reference without delineating what those circumstances are except where they can demonstrate that these documents are exempt under the Act;

(4) that defendants cease and desist from deleting from said Appeals and Advice materials the names of parties, the names of attorneys, citations to prior cases and all other information for which a justification for deletion has not been explained fully in writing except settlement suggestions from the Office of the General Counsel and the names of affiants.

/s/ H. J. Corcoran

Judge

Dated: August 10, 1972.

APPENDIX F

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D. C. 20543

March 26, 1973

Hon. Erwin N. Griswold
Solicitor General of the United States
Dept. of Justice
Washington, D. C. 20530

RE: Renegotiation Board v. Bannercraft
Clothing Co., Inc., Et Al., 72-822

Dear Sir:

The Court today entered the following order in the above-entitled case:

> The motion of Sears, Roebuck & Co. for leave to file a brief, as *amicus curiae*, is granted. The motion of Sears, Roebuck & Co. for leave to postpone oral argument is denied. Mr. Justice Powell took no part in the consideration or decision of these motions.

[Parties Served]

Michael Rodak, Jr.,
Clerk

By /s/ Helen Taylor
Helen Taylor, (Mrs.)
Assistant Clerk

APPENDIX G

The Public Information Act, 5 U. S. C. § 552, provides in relevant part:

5 U. S. C. 552(a)(2):

> Each agency, in accordance with published rules, shall make available for public inspection and copying—
>
> (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and
>
> (C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. * * * A final order opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used or cited as precedent by an agency against a party other than an agency only if—
>
> (i) it has been indexed and either made available or published as provided by this paragraph;
>
> (ii) the party has actual and timely notice of the terms thereof.

5 U. S. C. 552(a)(3):

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, or request for identifiable records * * * shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, agency records or to order the production of any agency has jurisdiction to enjoin the agency from withholding

records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

The Rules and Regulations and Statements of Procedure of the National Labor Relations Board, 29 C. F. R. 101.2 *et seq.*, provide in relevant part:

Sec. 102.8:

Party.—The term "party" as used herein shall mean * * * any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act * * * but nothing herein shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

Sec. 102.19:

Appeal to the general counsel from refusal to issue or reissue.—(a) If, after the charge has been filed, the regional director declines to issue a complaint, or having withdrawn a complaint pursuant to section 102.18, refuses to reissue it, shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his action. The person making the charge may obtain a review of such action by filing an appeal with the general counsel in Washington, D. C., and filing a copy of the appeal with the regional director, within 10 days from the service of the notice of such refusal to issue or reissue by the regional director, except as a shorter period is provided by section 102.81. * * * The appeal shall contain a complete statement setting forth the facts and reasons upon which it is based. * * *

* * * * *

(c) The general counsel may sustain the regional director's refusal to issue or reissue a complaint, stating the grounds of his affirmance, or may direct the regional director to take further action; the general counsel's decision shall be served on all the parties. * * *

Sec. 101.2:

Initiation of unfair labor practice cases.—The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge, which must be in writing and signed, and must either be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. The charge is filed with the regional director for the region in which the alleged violations have occurred or are occurring. * * *

Sec. 101.8:

Complaints.—If the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the regional director institutes formal action by issuance of a complaint and notice of hearing. In certain types of cases, involving novel and complex issues, the regional director, at the discretion of the general counsel, must submit the case for advice from the general counsel before issuing complaint. * * *

Sec. 101.9.

Settlement after issuance of complaint.—(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

Sec. 101.10:

Hearings.—(a) Except in extraordinary situations the hearing is open to the public and usually conducted in the

region where the charge originated. A duly designated trial examiner presides over the hearing. The Government's case is conducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint. The rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling. Counsel for the general counsel, all parties to the proceeding, and the trial examiner have the power to call, examine, and cross examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the trial examiner. * * *

Sec. 202.1.1:

The Division of Operations. The Associate General Counsel for the Division of Operations is responsible for the effective operation and administration of the regional, subregional, and resident offices of the agency—including the prompt and adequate investigation of all complaint cases before formal action; preparation of cases for trial; and, absent settlement, the trial of those cases. * * * He directs the activities of regional directors and supervises the regional offices for the General Counsel, through several assistant general counsels and their deputies. Under his supervision, the Advice Branch reviews regional offices' requests for advice and formulates policy on novel or unsettled procedural and substantive matters arising in unfair labor practice cases.

Sec. 202.1.2:

The Division of Litigation. The Office of Appeals is another part of the Division of Litigation. This office reviews appeals from regional directors' refusals to issue complaints in unfair labor practice cases and recommends the action to be taken thereon by the General Counsel. Pursuant to request, the director of the office also hears informal oral presentations in Washington of argument by counsel or other representatives of the parties in support of, or in opposition to, the appeals.